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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 805

NATHAN HAUSMAN, JOSEPH APPLEBAUM, THE APPLEBAUM FOUNDATION, INC., ALFRED N. BARNETT, JULIE A. BUCKLEY, as remaining trustee u w of Daniel Buckley, deceased, PETER FUNDARO, HAROLD MALTZ, NORVIN H. RIESER, FRED WEIBERT and REGINA WEIBERT and L. H. LUCKETT, in their own behalf as stockholders of Pantepec Oil Company, C.A., and in behalf of all other such stockholders similarly situated,

Petitioners,

—against—

JOHN W. BUCKLEY, THE CATAWBA CORPORATION and PANTEPEC OIL COMPANY, C.A.,

Respondents.

REPLY BRIEF OF PETITIONERS NATHAN HAUSMAN, *ET AL.*

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Nathan Hausman, Joseph Applebaum, The Applebaum Foundation, Inc., Alfred N. Barnett, Julie A. Buckley, as remaining trustee u w of Daniel Buckley, deceased, Peter Fundaro, Harold Maltz, Norvin H. Rieser, Fred. Weibert and Regina Weibert and L. H. Luckett, in their own behalf as stockholders of Pantepec Oil Company, C.A., and in behalf of all other such stockholders similarly situated,

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The petition urges that certiorari be granted for the following reasons:

1. There is no state rule, "clearly enunciated" (App. A to pet., p. 37) or otherwise, of mechanical referral to the law of the state of incorporation.

2. Notwithstanding that the choice of law issue is of first impression and of far-reaching importance to Pantepec's thousands of American shareholders and to many other American investors in non-American corporations, the court

below explicitly refused to function in the manner of a state court of last resort and to pass upon the merits of the basic question of law before it.

3. The rationale of the decision below invites use of a foreign charter to plunder American investors and to evade the whole body of protective state and federal case and statute law.

4. In the nature of this type of controversy, the question at bar is far more likely to arise in diversity cases in the federal court than in New York or other state courts; and if not reviewed by this Court, it may be years before the rule applied below can be successfully challenged.

5. The decision below leaves thousands of American shareholders, in what is essentially an American enterprise, and untold others similarly situated, completely without any practical remedy.

Several of these points are wholly ignored in the answering briefs and not one of them is fairly met.

I

Newman v. *Baldwin*, 13 Misc. 2d 897, 179 N. Y. S. 2d 19 (Sup. Ct. N. Y. Co. 1958), is the respondents' prime authority, as it was of the court below. None of the respondents questions our submission (pet. pp. 10-11) that the *Newman* case has no force as a precedent in any of the state appellate courts, and that it is not binding on any of the numerous state justices of coordinate jurisdiction. The *Newman* case does *not* exemplify "rules of decision commonly accepted and acted upon by the bar and inferior courts" in New York, as suggested by Pantepec (br. p. 6) by quotation from *West* v. *American Telephone & Telegraph*

Co., 311 U.S. 223, 236 (1940). The *Newman* case stands completely alone, being the *only* state decision at any level on fulfillment of pre-conditions for maintaining a suit of this nature in behalf of a foreign corporation.* Petitioners urge that it is a matter of most serious concern that, in this federal diversity case, a ruling of such nature bars thousands of American shareholders from complaining of continuing self-dealing and overreaching by an American management.

For other New York "authority" the respondents perforce refer to various of the old dicta cited in the opinion below. It is easy to see why none of these additional citations is discussed by respondents. None of them even remotely touches on the present question.

Russian Reinsurance Co. v. *Stoddard*, 240 N. Y. 149, 147 N. E. 704 (1925), was an action by a foreign insurance company to recover its statutory deposit. *German-American Coffee Co.* v. *Diehl*, 216 N. Y. 57, 109 N. E. 875 (1915), was an action by a foreign corporation against its directors to recover illegally paid dividends. *Vanderpoel* v. *Gorman*, 140 N. Y. 563, 35 N. E. 932 (1894), was an action against a sheriff by an assignee for creditors of an insolvent corporation to recover assets attached despite the assignment. *Matter of American Fibre Chair Seat Corp.*, 265 N. Y. 416, 193 N. E. 253 (1934), was a statutory proceeding for confirmation of the election of a director of a New York corporation. In *Long Park, Inc.* v. *Trenton-New Brunswick Theatre Co.*, 297 N. Y. 174, 77 N. E. 2d 633 (1948), the validity of an agreement among shareholders of a foreign

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* *Hirshhorn* v. *Hirshhorn*, 280 App. Div. 791, 112 N. Y. S. 2d 841 (2d Dept. 1952), also presented such a question but did not decide it because of inadequate proof of the foreign law. A concurring opinion therein on the merits found local rather than foreign law to be applicable. See petition, page 10.

corporation was determined under local rather than foreign law, Pantepec's reliance (br. p. 8) being on the dissenting opinion. Even the dicta in these cases were of the most general character and in no way envisaged the present issue. Not one of these decisions, nor any cited in the opinion below, furthermore, involved a non-American corporation. And neither of the answering briefs has ventured to comment on the numerous New York cases cited at pages 16-17 of the petition holding that claims against directors, officers and third parties for mismanagement and fraud do not involve "internal affairs".

Nor, we believe, is support for the ruling below to be found in other federal decisions which do not deal with the question at bar and in any event can have no better foundation than the decision sought to be reviewed.

If the foregoing state decisions reflect a "clearly enunciated state rule" which justifies a United States Court of Appeals in refusing to pass upon the merits of the legal issue before it and in refraining from applying the rule that it thinks "better or wiser" (App. A to pet., p. 37), diversity litigants should hereafter resort to a federal court only with the greatest trepidation.

II

Buckley's brief (p. 8) disingenuously suggests a predominance of Venezuelan contacts by reference to Pantepec's business prior to the "Phillips Agreement" which is the subject of the discontinued first count. The overwhelming American contacts, summarized at pages 5-6 of the petition, are ignored in both respondents' briefs, as they are in the opinion below.

III

In the trial court the defendants established that the rights granted to minority shareholders by the Venezuelan Code are "futile" and "theoretical" (192a). The trial judge expressly stated that it was proven that petitioners have no remedy under the law of Venezuela (153a).

The antediluvian law of Venezuela, well-calculated to throttle minority shareholders (158a-159a), is summarized at pages 6-7 of the petition. It is not correct, as Buckley now asserts (br. p. 11), that any stockholder may place his complaint and the basis therefor before a stockholders' meeting. Plainly all complaints must be channeled through the "comisario" who, in the case of a corporation like Pantepec, is a hireling of management and may even be on the company payroll (188a [Art. 310]; 150a-151a; 154a-155a). The impossible deposit requirement, mentioned at page 7 of the petition and disputed by Buckley (br. p. 12), unquestionably is mandatory in the case of bearer shares like Pantepec's (157a, lines 10-12; 31a).

The claimed equation between the Venezuelan law and the "Massachusetts rule" (see *S. Solomont & Sons Trust, Inc.* v. *New England Theatres Operating Corp.*, 326 Mass. 99, 93 N. E. 2d 241 (1950); *Pomerantz* v. *Clark*, 101 F. Supp. 341 (D. Mass. 1951)) is specious because (1) in Venezuela only holders of 10% or more of stock have a right to lay a complaint before a shareholders' meeting, whereas in Massachusetts any shareholder may do so; (2) in Venezuela complaining shareholders have to deposit their shares until the conclusion of the shareholders' meeting, whereas no such requirement prevails in Massachusetts; (3) in Venezuela a majority vote against a suit is conclusive even though the wrongdoers control the shareholders' meeting, whereas in Massachusetts only the vote of a disinterested majority can bind the minority; and

(4) in Venezuela small shareholders of large companies have no practical means of mustering the 10% necessary to lay a complaint before the shareholders' meeting, access to the stock list being restricted to the fifteen days immediately in advance of the meeting, whereas no such obstacle obtains in Massachusetts. Furthermore, it is far from clear that New York would be bound to give effect even to the Massachusetts rule if the interests of New York citizens predominated over those of Massachusetts in one of its corporations. Cf. *Watson* v. *Employers Liability Assurance Corp.*, 348 U. S. 66 (1954); *Wells* v. *Simonds Abrasive Co.*, 345 U. S. 514 (1953); *Griffin* v. *McCoach*, 313 U. S. 498 (1941); Currie, *The Constitution and the Choice of Law*, 26 U. of Chi. L. Rev. 9 (1958). The basic philosophical difference between Massachusetts which has no faith in the prophylactic effect of minority stockholders' suits, and all the other states which find them useful, has been commented on at length by Judge Wyzanski in *Pomerantz* v. *Clark*, *supra*, 101 F. Supp. at pp. 346-7. New York is perhaps first among all the states in its readiness to cast off ritualistic conflict-of-laws rules subversive of its own interests and policy. *Kilberg* v. *Northeast Airlines, Inc.*, 9 N. Y. 2d 34, 172 N. E. 2d 526 (1961). Notwithstanding, petitioners have lost their day in court on the admittedly unreasoned assumption that New York would mechanically apply the anachronistic and iniquitous law, not even of a sister state, but of a foreign country having no conceivable interest in the controversy.

Dated, New York, N. Y.
May 5, 1962

Respectfully submitted,

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